In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1038

ROBERT R. KRILICH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 470 F.2d 341.

JURISDICTION

The judgment of the court of appeals was entered on November 28, 1972. A timely petition for rehearing was denied on December 27, 1972. The petition for certiorari was filed on January 26, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the "one inspection" rule of Section 7605(b) of the Internal Revenue Code of 1954 barred introduction of evidence relating to petitioner's tax books and records.

2. Whether the Jencks Act required production of a special agent's complete summary of all aspects of his investigation, when he testified only as to his interviews with petitioner.

3. Whether petitioner has been illegally subjected to multiple punishments for a single offense.

STATUTES INVOLVED

Sections 7201, 7206(1), and 7605(b) of the Internal Revenue Code of 1954, 26 U.S.C. 7201, 7206(1), and 7605(b), and the Jencks Act, 18 U.S.C. 3500, are set forth in pertinent part at Pet. 2-4.

STATEMENT

After a bench trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of willfully subscribing, under the penalties of perjury, a false tax return for 1963, in violation of 26 U.S.C. 7206(1), and of attempting to evade tax, in violation of 26 U.S.C. 7201. Petitioner was sentenced to concurrent terms of eighteen months' imprisonment and fined $5,000.

The evidence at trial showed that petitioner fraudulently reduced his reported tax liability for 1963 by taking two separate fictitious deductions, one in the amount of $95,048.84 and the other in the amount of $200,000 (R. 36-37, 63-65, 67; Pet. App. 2a-3a, 11a).[1] Together, these deductions resulted in an understatement of petitioner's tax liability in the amount of $66,879.65 (Pet. App. 2a). Petitioner does not here challenge the sufficiency of the evidence.

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[1] "R." refers to the record appendix filed in the court of appeals.

Petitioner's tax return for 1963 was audited and finally approved by the Internal Revenue Service in 1966 (R. 23; Pet. 6). In 1969, the Internal Revenue Service was engaged in an investigation of the tax returns of Sam Papanek, who had sold to petitioner property which the latter had in turn sold in 1963, and of Edward Bluthardt, who was suspected of receiving bribes in connection with the re-zoning of the property (R. 26; Pet App. 12a). In connection with this investigation, an internal revenue summons was issued on August 12, 1969, to petitioner's accountant for corporate and personal records relating to the purchase and development of the property (R. 12), and the records were produced without any objection from either petitioner or his accountant (R. 24, 58). An inspection of these records led to the initiation of a criminal investigation of petitioner's 1963 return on December 22, 1969 (R. 30). At the conclusion of this investigation, Internal Revenue Service Special Agent Popovits prepared a voluminous Special Agent's Report (S.A.R.), which included copies of documentary evidence, statements and memoranda of interviews with both petitioner and third parties, and a narrative report summarizing the investigation (R. 57-60).

At trial, Special Agent Popovits testified only with respect to his interviews with petitioner; all material in the S.A.R. relating to those interviews was furnished to petitioner (R. 58-60; Pet. App. 18a). Petitioner requested production of the entire S.A.R. and the district court, after an *in camera* inspection, denied that request (*ibid.*). The district court also denied petitioner's motions to suppress the records which his accountant had furnished to the Internal Revenue Service in connection with the Papanek and Bluthardt investigations (R. 6-12, 34).

The court of appeals affirmed (Pet. App. 1a-18a),

holding that the evidence "overwhelmingly" sustained the conviction (Pet. App. 11a), that petitioner's motions to suppress were properly denied (Pet. App. 12a-17a), and that the petitioner's request for documentary production was also properly denied (Pet. App. 17a-18a).

ARGUMENT

1. Petitioner contends (Pet. 10-17) that since his tax books and records were first inspected in connection with the audit which concluded in 1966, the inspection made in 1969, in the course of the investigations of Papanek and Bluthardt, was a second inspection barred by 26 U.S.C. 7605(b),[2] and that the proper means of enforcing that provision should have been the exclusion of the books and records at trial. This contention is erroneous for two separate reasons.

First, the 1969 inspection of petitioner's books and records did not subject him to "examination or investigations" within the meaning of Section 7605(b): that provision does not bar a second inspection of a taxpayer's records when the purpose of the inspection is the determination only of the liability of a third party and not of the taxpayer. *United States* v. *Howard,* 360 F. 2d 373, 380 (C.A. 3); *Bouschor* v. *United States,* 316 F. 2d 451, 457 (C.A. 8); *Hubner* v. *Tucker,* 245 F. 2d 35, 39 (C.A. 9). The purpose of Section 7605(b) was to prevent harassment of taxpayers whose returns had already been fully audited, but it was not intended to frustrate legitimate investiga-

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[2] Section 7605(b) states: "No taxpayer shall be subjected to unnecessary examination or investigations, and only one inspection of a taxpayer's books of account shall be made for each taxable year unless the taxpayer requests otherwise or unless the Secretary or his delegate * * * notifies the taxpayer in writing that an additional inspection is necessary."

tions into the liabilities of third parties.[3] Conversely, Section 7605(b) was not intended to hamper ordinary audit where a taxpayer's books had already been inspected in the course of an inspection of a third party's returns. The courts therefore have properly excluded such third party inspections from the ambit of Section 7605(b).

Second, even assuming that the 1969 inspection technically violated Section 7605(b), because neither the Secretary nor his delegate informed petitioner that a second inspection was "necessary," that technical violation should not result in the suppression or exclusion of evidence, especially in the absence of any contemporaneous objection. Petitioner's failure to assert his objection promptly when the summons was issued constituted a waiver of the requirement of a written notice of necessity. See, *e.g.*, *Rife* v. *Commissioner*, 356 F. 2d 883, 887 (C.A. 5); *Lessmann* v. *Commissioner*, 327 F. 2d 990, 996 (C.A. 8). Technical objections to the sufficiency of a subpoena should be made promptly in order that minor deficiencies may be corrected. *McPhaul* v. *United States*, 364 U.S. 372, 379; *United States* v. *Bryan*, 339 U.S. 323, 332-333. Petitioner's appropriate remedy was to contest the summons. Taxpayers should not be given the privilege of concealing their objections to summonses in order to defeat a subsequent prosecution.

2. Petitioner contends (Pet. 18-20) that the "S.A.R." related in its entirety to the subject matter of the special

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[3] Typically such investigations will be conducted by agents who are unaware of any previous inspection of the taxpayer's records. The implication of petitioner's argument is that the Internal Revenue Service should maintain more elaborate data banks in order to insure that no agents will unwittingly issue a summons to a taxpayer who has some relationship to the transactions being investigated but whose records were once inspected in an audit of his own tax return.

agent's trial testimony and was therefore producible under the Jencks Act. However, the district court reviewed the S.A.R. *in camera* and concluded that the only portions which related to the special agent's testimony had already been furnished to petitioner and that production of the remaining portions was not required. The court of appeals agreed. Further review of that essentially factual determination is not warranted. Petitioner's contention may rest on the assumption that the Jencks Act requires production of any written statement, made by a witness, which relates generally to the prosecution's case. But the Jencks Act has not been so broadly construed. See, *e.g., United States* v. *Lacob,* 416 F. 2d 756 (C.A. 7), certiorari denied, 396 U.S. 1059; *Oertle* v. *United States,* 370 F. 2d 719 (C.A. 10), certiorari denied, 387 U.S. 943; *United States* v. *Keig,* 334 F. 2d 823 (C.A. 7). And the only case cited by petitioner requiring production of a S.A.R., *United States* v. *O'Connor,* 273 F. 2d 358 (C.A. 2), was decided in the context of broadly ranging testimony by special agents covering all aspects of their investigation; as pointed out above, the testimony given by the special agent in the instant case was more narrowly focused and did not cover all matters discussed in the S.A.R.[4]

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[4]Petitioner contends (Pet. 20, n. 12) that the alleged violtion of the Jencks Act was not harmless. However, he fails to establish how the S.A.R. could have been helpful other than as possibly providing evidence that the "one inspection" rule of Section 7605(b) had been broken. But as we have shown (p.5, *supra*), petitioner's only remedy against an alleged abuse of the summons power was a contemporaneous challenge to the validity of the summons, and information acquired from a S.A.R written long after the enforcement of the summons obviously would be irrelevant to any attempt to assert that remedy. Thus even if production of the S.A.R. was required under the Jencks Act, the denial of petitioner's request for production was at most harmless error.

3. Petitioner contends (Pet. 20-22) that his convictions under Sections 7201 and 7206(1) illegally subject him to multiple punishments for a single offense. However, petitioner's sentences were concurrent; he has not in fact shown multiple punishments.[5]

This contention was first raised after entry of judgment in the court of appeals, in the form of a motion for recall of mandate (Pet. 21). Thus it has received no consideration by the district court and was not discussed by the court of appeals in its opinion. Moreover, it presumably was not considered on the merits by the court of appeals: petitioner's basic complaint is to the intructions of the district court permitting the jury to convict him under both counts of the indictment, and his failure to object to those instructions precluded a later assignment of error on appeal (Rule 30, Fed. R. Crim. P.); and since the sentences were concurrent, there was no plain error "affecting substantial rights" which could be noticed by the court of appeals under Rule 52, Fed. R. Crim. P. For the same reasons, the issue is not properly before this Court.

In any event, the separate convictions were appropriate. The elements of the offenses committed by petitioner are separate and distinct: Section 7201 requires an attempt to avoid tax, not a false statement; conversely, Section 7206(1) requires a false statement made under penalties of perjury, but that statement need not affect the actual

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[5] The cases on which petitioner relies, *United States* v. *White*, 417 F. 2d 89 (C.A. 2), certiorari denied, 397 U.S. 912, and *United States* v. *Lodwick*, 410 F. 2d 1202 (C.A. 8), certiorari denied, 396 U.S. 841, both involved consecutive sentences or cumulative fines in excess of the maximum penalties under Section 7201. Petitioner suggests that his multiple convictions may have collateral consequences but is unable to say what those consequences might be.

amount of the declarant's tax liability. Thus neither offense is a lesser offense included within the other. For example, in this case petitioner could have been convicted under Section 7201 without proof that he had signed his return; similarly, he could have been convicted under Section 7206(1) without proof of an attempt to evade tax. Having committed both offenses, petitioner was properly convicted of both.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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